



United States Department of the Interior

OFFICE OF THE SECRETARY

Washington, DC 20240

IN REPLY REFER TO:
7202.4-OS-2018-01163

October 10, 2019

Via email:

53753-85367588@requests.muckrock.com

Jimmy Tobias
Reporter, Pacific Standard Magazine
MuckRock News
DEPT MR 54080
411A Highland Ave
Somerville, MA 02144-2516

Dear Mr. Tobias:

Re: Tobias v. U.S. Dep't of the Interior, No. 18-2342 (D.D.C.), concerning FOIA requests tracked as 18-00735, 18-01060, 18-01155, 18-01156, 18-01158, 18-01163, 18-01173, 18-01174, 18-01199, 18-01296, 18-01298, 18-01355

Dear Mr. Tobias:

On May 9, 2018, you filed a Freedom of Information Act (FOIA) request, which we entered as OS-18-01158, seeking the following:

[A]ll written or electronic communications, including attachments, sent or received by Acting Secretary for Fish, Wildlife and Parks Susan Combs, or her executive assistant, that contain one or more of the following words or phrases: "Endangered species Act", "ESA", "endangered species", "threatened species", "sage grouse", "Texas hornshell", "sagebrush lizard", "incidental take", "4(d) rule" and/or "4(d)". This request pertains to records produced between April 1, 2018 and the date this request is processed.

We are writing today to respond to your request on behalf of the Office of the Secretary. We are releasing 3 files consisting of 466 pages. Of those 466 pages, 30 documents contain redactions as described below. We are conducting a consultation on 48 additional pages. Additional releases on other requests will be forthcoming as we process additional records.

Portions of the enclosed documents have been redacted pursuant to Exemption 5 of the FOIA (5 U.S.C. § 552(b)(5)) under the following privileges:

**Deliberative Process
Confidential Commercial Information Privilege**

Exemption 5 allows an agency to withhold “inter-agency or intra-agency memorandums or letters which would not be available by law to a party... in litigation with the agency.” 5 U.S.C. § 552(b)(5). As such, the Exemption 5 “exempt[s] those documents... normally privileged in the civil discovery context.” National Labor Relations Bd. v. Sears, Roebuck & Co., 421 U.S. 132, 149 (1975). The exemption incorporates the privileges that protect materials from discovery in litigation. These privileges include deliberative process, confidential commercial information, attorney work-product, and attorney-client. See *id.*; see also Federal Open Market Committee v. Merrill, 443 U.S. 340, 363 (1979) (finding a confidential commercial information privilege under Exemption 5).

Deliberative Process Privilege

The deliberative process privilege “protects the decisionmaking process of government agencies” and “encourages the frank discussion of legal and policy issues” by ensuring that agencies are “not forced to operate in a fishbowl.” Mapother v. United States Dep’t of Justice, 3 F.3d 1533, 1537 (D.C. Cir. 1993) (citing Wolfe v. United States Dep’t of Health & Human Services, 839 F.2d 768, 773 (D.C. Cir. 1988)). Three policy purposes have been advanced by the courts as the bases for this privilege: (1) to encourage open, frank discussions on matters of policy between subordinates and superiors; (2) to protect against premature disclosure of proposed policies before they are finally adopted; and (3) to protect against public confusion that might result from disclosure of reasons and rationales that were not in fact ultimately the grounds for an agency’s action. See Coastal States Gas Corp. v. United States Dep’t of Energy, 617 F.2d 854, 866 (D.C. Cir. 1980).

The deliberative process privilege protects materials that are both predecisional and deliberative. Mapother, 3 F.3d at 1537; Access Reports v. United States Dep’t of Justice, 926 F.2d 1192, 1195 (D.C. Cir. 1991); Vaughn v. Rosen, 523 F.2d 1136, 1143-44 (D.C. Cir. 1975). A “predecisional” document is one “prepared in order to assist an agency decisionmaker in arriving at his decision,” and may include “recommendations, draft documents, proposals, suggestions, and other subjective documents which reflect the personal opinions of the writer rather than the policy of the agency.” Maricopa Audubon Society v. United States Forest Service, 108 F.3d 1089, 1093 (9th Cir. 1997). A predecisional document is part of the “deliberative process” if “the disclosure of [the] materials would expose an agency’s decisionmaking process in such a way as to discourage candid discussion within the agency and thereby undermine the agency’s ability to perform its functions.” Dudman Communications Corp. v. Department of the Air Force, 815 F.2d 1565, 1568 (D.C. Cir. 1987).

The deliberative process privilege does not apply to records created 25 years or more before the date on which the records were requested.

We reasonably foresee that disclosure would harm an interest protected by exemption 5. Those portions of the documents that have been withheld pursuant to the deliberative process privilege of Exemption 5 are both predecisional and deliberative. They do not contain or represent formal or informal agency policies or decisions. They are the result of frank and open discussions among employees of the Department of the Interior. Therefore, their content has been held confidential by all parties. Public dissemination of this information would have a chilling effect

on the agency's deliberative processes; it would expose the agency's decision-making process in such a way as to discourage candid discussion within the agency and thereby undermine its ability to perform its mandated functions.

Confidential Commercial Information Privilege

When the government enters the marketplace as an ordinary commercial buyer or seller, the government information is protected from competitive disadvantage under Exemption 5. Government Land Bank v. General Services Administration, 671 F.2d 663, 665 (1st Cir. 1982). Exemption 5 prevails "where the document contains 'sensitive information not otherwise available,' and disclosure would significantly harm the government's commercial interest." Id. at 666; see also Merrill, 443 U.S. at 363.

Pursuant to the confidential commercial information privilege, conference call codes and passcodes have been withheld under Exemption 5. This information constitutes "intra-agency" documents because they are only shared with members of the Department of the Interior for the purpose of conducting official government business. Moreover, this information qualifies as "confidential commercial information" because the government entered the marketplace as an ordinary commercial buyer.

In line with Land Bank and Merrill, the information is "sensitive and not otherwise available." If the information was released, the government's financial interest would be significantly harmed. The conference calls would no longer be private since unknown, non-governmental parties would have the ability to listen in to the calls. The funds spent on purchasing the information would therefore be wasted, and the information would be of no use.

Because we reasonably foresee that the release of this information would significantly harm the government's financial interest by publicizing sensitive information, the Office of the Secretary is withholding it in accordance with Exemption 5 of the FOIA.

Portions of the documents may be redacted pursuant to Exemption 6 of the FOIA (5 U.S.C. § 552(b)(6)) because they fit certain categories of information:

Personal Information, E-mail Addresses

Exemption 6 allows an agency to withhold "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." The courts have held that the phrase "similar files" involves all information that applies to a particular person. Hertzberg v. Veneman, 273 F. Supp. 2d 67, 85 n.11 (D.D.C. 2003).

To determine whether releasing requested information would constitute a clearly unwarranted invasion of personal privacy, we are required to perform a "balancing test." This means that we must weigh the individual's right to privacy against the public's right to disclosure.

- (1) First, we must determine whether the individual has a discernable privacy interest in the information that has been requested.

- (2) Next, we must determine whether release of this information would serve “the public interest generally” (i.e., would “shed light on the performance of the agency's statutory duties”).
- (3) Finally, we must determine whether the public interest in disclosure is greater than the privacy interest of the individual in withholding.

The information that we are withholding consists of personal information, and we have determined that the individuals to whom this information pertains have a substantial privacy interest in it. Additionally, we have determined that the disclosure of this information would shed little or no light on the performance of the agency's statutory duties and that, on balance, the public interest to be served by its disclosure does not outweigh the privacy interest of the individuals in question, in withholding it. Nat'l Ass'n of Retired Fed. Employees v. Horner, 879 F.2d 873, 879 (D.C. Cir. 1989).

In summation, we have determined that release of the information that we have withheld would constitute a clearly unwarranted invasion of the privacy of these individuals, and that it therefore may be withheld, pursuant to Exemption 6.

Leah Bernhardt, Attorney-Advisor, in the Office of the Solicitor, was consulted in reaching this decision. Ryan McQuighan, Office of the Secretary Government Information Specialist, is responsible for making this decision.

For your information, Congress excluded three discrete categories of law enforcement and national security records from the requirements of the FOIA. See 5 U.S.C. § 552(c). This response is limited to records that are subject to the requirements of the FOIA. This is a standard notification that is given to all our requesters and should not be taken as an indication that excluded records do, or do not, exist.

If you have any questions regarding any of the issues discussed in this letter, you may contact Ryan McQuighan by phone at 202-513-0765, by fax at 202-219-2374, by e-mail at os_foia@ios.doi.gov, or by mail at U.S. Department of the Interior, 1849 C St, NW, MS-7328 MIB, Washington, D.C. 20240. You also may seek dispute resolution services from our acting FOIA Public Liaison, Tony Irish, at the phone and address above.

Sincerely,

Ryan McQuighan
Office of the Secretary
Government Information Specialist